In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1145

EDWARD COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the Middle District of Florida on five counts of having willfully attempted to evade and defeat his income taxes for the years 1966 through 1970, in violation of 26 U.S.C. 7201. He was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed (Pet. App. A1-A11).

Petitioner contends (1) that the evidence was insufficient to sustain the conviction and (2) that he was deprived of a fair trial because of misconduct by the prosecution.

The government's case was predicated upon the "expenditures" method of proof.[1] See *United States* v. *Penosi*, 452 F.2d 217 (C.A. 5). The evidence established that during the prosecution years, petitioner's expenditures were in excess of $151,000, even though he had available only $13,000 from nontaxable sources (Tr. 183-185, 187-189; Exs. 87, 93).[2] During those years, petitioner had not filed income tax returns (Tr. 110-113). An exhaustive search was conducted to determine petitioner's assets, and nontaxable and taxable sources of income.[3] This

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[1]Petitioner urges (Pet. 10, 12) that certiorari should be granted because this Court "has not yet reviewed an income tax evasion conviction where the government proceeded * * * by the 'expenditures' theory of proof" and that this case "presents an excellent opportunity for this Court for the first time to speak to the requirements of proof in an expenditures-method tax prosecution." But the expenditures method of proof is simply a variant of the net worth method for establishing the receipt of unreported taxable income (see *Taglianetti* v. *United States*, 398 F.2d 558, 562 (C.A. 1), affirmed on another point, 394 U.S. 316), which this Court has approved in *Holland* v. *United States*, 348 U.S. 121. See also *United States* v. *Johnson*, 319 U.S. 503, 517, where this Court held that the fact that the defendant "had large, unreported income was reinforced by proof which warranted the jury in finding that * * * the private expenditures of * * * [the defendant] exceeded his declared available resources." In any event, petitioner does not challenge the theory of proof, but presents only the factual question of whether there was sufficient evidence to support the conviction.

[2]"Tr." and "Exs." respectively refer to the transcript of trial proceedings and the government exhibits admitted in evidence at trial.

[3]The investigating agent searched the public records in four counties; contacted financial institutions throughout the country, including over 1,000 banking institutions, securities brokers, and real estate and mortgage companies; checked both petitioner's and his wife's Social Security transcripts; checked records of the Internal Revenue Service; attempted to interview the petitioner; and, contacted third parties in an attempt to determine whether petitioner might have had financial dealings with them (Tr. 117-118, 152-154).

search revealed that petitioner had not received any inheritances or gifts (Tr. 225, 230-231), had a net worth starting point as of January 1, 1966, of $5,850 (Tr. 194-196; Ex. 92), and, except for earning $250 a week between May 19, 1962, and May 6, 1964, he earned no income or worked at different jobs, none of which lasted more than 12 days from May 21, 1944, to August 16, 1965 (Tr. 62-63, 228).[4]

The investigation also showed that while petitioner stated to bank officials that he could pledge two automobiles and a substantial amount of jewelry he maintained in his vault, he never actually borrowed any money on the strength of such assets (Tr. 86-87). In addition, while consistently representing on credit card and loan applications during the prosecution years that he had an income of $18,000 to $25,000 derived from the cosmetic business[5] or from activity in stocks, bonds, and investments (Tr. 84-85, 133, 137, 139, 142, 150), petitioner told Francis Beirne, a police officer with the Public Safety Department of Dade County, Florida, at the time he was under investigation by the Internal Revenue Service, that his standard explanation for not filing income tax returns was that his wife had all the wealth and that he had never held a job or earned $600 in any one year (Tr. 108-109, 113). Finally, the evidence established that

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[4]As the court of appeals noted (Pet. App. A2), petitioner was totally unemployed and earned no income whatsoever from 1944-1948, 1951-1960 and 1964-1965.

[5]Evidence of other business activity by petitioner during the prosecution years included his ordering of locksmith's tools under the trade name Cook's Key and Hobby Shop and his representation in 1967 that he was in the perfume business or had something to do with a doughnut establishment (Tr. 71, 103-104).

petitioner had large and extensive dealings in cash during the prosecution years (Tr. 37-38, 69-70, 76, 129-131) and that his cash expenditures were significantly larger than expenditures made by check (Tr. 188-189).

1. Contrary to petitioner's contention (Pet. 10-12), the court of appeals correctly concluded that there was sufficient evidence to sustain his conviction for income tax evasion. Petitioner's claim that there was unrefuted evidence that he possessed cash and convertible assets sufficient to account for the cash expenditures has no support in the record. From the evidence of little or no income prior to 1966, credit purchases during the prosecution years, failure to list the cash and assets as collateral on loan applications, and the absence of non-taxable sources of income, the jury was amply justified in concluding that he was living on taxable income received during the prosecution years, upon which he willfully evaded taxation, rather than on a previously accumulated cash hoard.

Petitioner's assertion (Pet. 13-17) that there was no proof of any affirmative act of evasion, as required by *Spies* v. *United States*, 317 U.S. 492, and *Sansone* v. *United States*, 380 U.S. 343, is similarly without merit. Evidence of petitioner's large and extensive cash dealings and of his inconsistent statements as to the sources of his income was sufficient to permit the jury to infer that he had engaged in conduct, the "likely effect of which would be to mislead or to conceal." *Spies* v. *United States*, *supra*, 317 U.S. at 499.

2. Petitioner further contends (Pet. 17-29) that various actions of the government prosecutor, to which no ob-

jection was made, deprived him of a fair trial.[6] Specifically, he argues that the prosecution improperly implied in its cross-examination of defense witnesses Brodsky and Chapman that it possessed impeaching evidence, although it thereafter did not offer rebuttal when the questions were answered adversely. However, petitioner's counsel capitalized upon the lack of rebuttal in his closing argument (Tr. 342) to show that the answers to the questions supported the defense. As the court of appeals noted (Pet. App. A7), the government's failure to provide rebuttal was "more likely to have aided than harmed [the] defendant."

Petitioner also contends (Pet. 26-27) that there was plain error in the prosecution's closing argument to the jury. In arguing to the jury, the prosecutor stated (Tr. 336):

> Only to the Internal Revenue Service and to you does he need hide because he has a technical income, because he had a cash hoard. It is evidence of the record that such a cash hoard did not exist. He was lying and purposely and willfully evading the income tax.

The court of appeals correctly held (Pet. App. A9) that petitioner's attempt to characterize the "hide" comment

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[6]Petitioner asserts (Pet. 28) that the court of appeals was incorrect in treating these claims under the "plain error" rule, because the claims were, in fact, raised in the trial court—*i.e.*, in a post-trial motion for a new trial (Pet. 28, n. 13). However, both in his reply brief (p. 11) and in his petition for rehearing (pp. 2-3), petitioner conceded that these claims had not been raised in the trial court. Moreover, the policy underlying the "plain error" principle is that objections should be made prior to verdict, at a time when the matter objected to, if improper, can be corrected without need of a new trial. Accordingly, post-verdict claims cannot avoid application of the "plain error" standard of review.

as an allusion to his "refusal to testify requires an inference which is altogether too tenuous to support plain error reversal." At most, the remark is ambiguous. *Desmond* v. *United States*, 345 F.2d 225 (C.A. 1), relied upon by petitioner (Pet. 27), is distinguishable; there the prosecutor stated unambiguously, in a situation in which a nontestifying defendant was clearly the only one who could contradict the government's evidence, that the government's evidence "stands unimpeached and uncontradicted" (345 F.2d at 226).

The remark of the prosecutor that petitioner "was lying" was not an inappropriate characterization of his testimony in the face of the overwhelming evidence of his misstatement of income. Indeed, defense counsel not only did not object to the remark, but he attempted to turn it against the prosecutor in his own closing argument (see Tr. 341). Under these circumstances, and in the face of evidence of guilt that the court of appeals characterized as "substantial" (Pet. App. A11), there was no improper prejudicial effect from the prosecution's closing argument.[7]

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[7]Petitioner also contends (Pet. 24-25) that the prosecutor improperly referred to testimony of an agent of the Internal Revenue Service that petitioner had told him that he did not have to file tax returns as he never made $600 a year in his life. Petitioner asserts that this testimony was ruled inadmissible. The testimony, however, came in before any objection was offered (Tr. 155-156). After a hearing out of the presence of the jury, petitioner's counsel, rather than moving to strike the testimony, said, "I know it will be very delicate if we reopen it before a jury" (Tr. 223). Moreover, as the court of appeals noted (Pet. App. A8), "the problem for treating it as plain error is that the very same statement had been admitted in evidence through Officer Beirne" — *i.e.*, that petitioner told him that his standard explanation to the Internal Revenue Service for not filing returns was that he never had $600 income in any one year.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

The refusal of the court of appeals to reverse upon the basis of "plain error" does not, as petitioner contends (Pet. 28-29), create a conflict of decisions. Since a determination that "plain error" has occurred depends upon a thorough consideration of the peculiar facts of each particular case (*Kotteakos* v. *United States*, 328 U.S. 750, 761-765), the cases cited by petitioner (Pet. 28) are distinguishable on their facts.